

# An Overview of Trust Law & Trustee Services in the British Virgin Islands



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## Background

In addition to being the world's leading international finance centre in which to set up companies, the British Virgin Islands ('BVI') is now regarded as one of the world's premier trust jurisdictions.

The general principles of the trust laws of the BVI are derived from those of English trust law. The principles of English common law and equity apply, as supplemented by BVI statute. The original Trustee Act was based on the English Trustee Act 1925 and Variation of Trusts Act 1958 but has now been updated by the Trustee (Amendment) Acts, 1993, 2003 and 2013. Other significant statutes relating to trusts and trustee services in the British Virgin Islands are the Virgin Islands Special Trusts Act, 2003 as amended in 2013 ("VISTA"), the Banks and Trust Companies Act, 1990 and the Financial Services (Exemptions) Regulations, 2007 (as also amended in 2013).

Trusts in the BVI may be established by persons in any part of the world with property or investments in any part of the world. Trusts may be discretionary or fixed interest in nature or indeed any other type of trust recognised under English common law. Income from the trust capital may be accumulated for the entire length of the period of the trust and since May 2013 the Trustee Act enables new beneficiary trusts to have a fixed perpetuity period of up to 360 years as an alternative to the old common law period of lives in being plus 21 years.

BVI trusts are in general exempt from registration and filing requirements and there are also very wide exemptions from taxation in the Trustee Act.

There are further provisions in the Trustee Act giving statutory recognition to protectors and authorising the reservation of specified powers to settlors of BVI trusts. The statute also includes provisions enabling standard trustee powers to be incorporated by way of reference to a schedule to the Act, thereby enabling the length of trust deeds to be reduced.

### Virgin Islands Special Trusts Act, 2003

#### - Difficulties which arise from English trust law where trust assets comprise shares

The trust has always been regarded as one of the best 'succession vehicles', but its use to cater for the succession of shares in companies has historically been impeded by a rule of English trust law (the 'prudent man of business rule') which was designed to help preserve the value of trust investments. This rule traditionally made the trust an unattractive vehicle to hold assets which settlors intend trustees to retain. Another aspect of the rule effectively required trustees to monitor and intervene in the affairs of underlying companies (as the English decisions *Re Lucking's Will* and *Bartlett v Barclays Bank Trust Co Ltd* made clear); this also created difficulties both from the settlor's standpoint and from that of the trustee.

The Virgin Islands Special Trusts Act enables special BVI trusts, which are known as VISTA trusts, to be created which circumvent these difficulties.

### - **Disengaging trustee from management responsibility**

The Act enables a shareholder to establish a trust of his company that disengages the trustee from management responsibility and permits the company and its business to be retained as long as the directors think fit. This is achieved in general terms by:

- (a) authorising the entire removal of the trustee's monitoring and intervention obligations (except to the extent that the settlor otherwise requires);
- (b) permitting the settlor to confer on the trustee a role more suited to a trustee's abilities, namely a duty to intervene to resolve specific problems;
- (c) allowing trust instruments to lay down rules for the appointment and removal of directors (so reducing the trustee's ability to intervene in management by appointing directors of its own choice);
- (d) giving both beneficiaries and directors the right to apply to the court if trustees fail to comply with the requirements for director appointment and removal; and
- (e) prohibiting the sale of shares without directors' approval.

### - **Features of VISTA**

Some features of VISTA are as follows:

- (a) VISTA does not apply to BVI trusts *generally*: it only applies where there is a provision in the trust instrument directing the Act to apply. The trust instrument may however specify a future date on or event on the occurrence of which the Act will apply (or cease to apply), i.e., since for instance some settlors like VISTA only to apply until (or else to cease to apply to the trust following) their deaths. The events on which VISTA starts (or ceases) to apply to a trust may include the service on the trustee of a 'trigger direction', which is made by a person or committee; the trigger direction may be given in a fiduciary or non-fiduciary capacity.
- (b) Where VISTA applies, designated shares will be held on 'trust to retain' and the trustee's duty to retain the shares as part of the trust fund will have precedence over any duty to preserve or enhance their value. The trustee is not therefore liable for the consequences of holding (rather than disposing of) the shares. There will however be nothing to prevent trustees from transferring shares to beneficiaries in the exercise of any relevant dispositive powers under the trust.
- (c) The Act specifies that, subject to any contrary provisions in the trust instrument and subject to the comments set out in paragraph (d) immediately below, unless the trustee is acting on an 'intervention call' (as defined in the Act), the trustee may not exercise its voting or other powers so as to interfere in the management or conduct of any business of the company; the management or conduct of the

company's business will be left to those appropriate to deal with it, namely its directors, whose fiduciary duties to the company will remain intact, except to the extent that the trustee/shareholder will be refrained *qua trustee* from exercising some of the powers of a shareholder.

- (d) The 2013 amendments to the statute provide that the trustee-shareholder is not prevented by the terms of VISTA from exercising (i) its statutory rights to inspect, make copies of or take extracts from specified documents (such as registers of directors ) and (ii) its entitlements to inspect, make copies, or take extracts from accounts and records of companies and underlying companies pursuant to provisions in the company's articles of association; this amendment ensures the trustee can appropriately protect itself against unforeseeable reputational risks.
- (e) The statute also provides that the trust instrument may include 'office of director rules' specifying how the trustee must exercise its voting powers in relation to appointment, removal and remuneration of directors, and the trustee will generally be required to follow these rules. Except in compliance with these rules, the trustee must generally take no steps to procure the appointment or removal of the company's directors. This ingredient of the legislation provides an effective succession mechanism to directorships in controlled companies (which is especially popular in the context of VISTA purpose trusts which are set up to hold shares in private trust companies).
- (f) The Act further provides that the trust instrument may specify that the trustee may intervene in the affairs of the company in specified circumstances, i.e. when required to do so by an 'intervention call' by a beneficiary, an object of a discretionary power of appointment, a parent or guardian of either of them, a protector (unless the trust instrument provides otherwise), the Attorney General (in relation to charitable trusts), the enforcer (in relation to purpose trusts) or other specified persons such as anyone appointed by the terms of the trust to fill this rôle.
- (g) The Act specifies that (unless the trust instrument provides otherwise) the trustee is permitted to dispose of designated shares in the management or administration of the trust fund, but can only do so with the consent of the directors of the company (and/or that of such persons as are specified in the trust instrument).
- (h) VISTA contains provisions enabling beneficiaries, directors and others to apply to the court for enforcement of the terms of the Act and, on the application of a specified person, the court is empowered to authorise the trustees to sell designated shares where retaining them is no longer compatible with the wishes of the settlor.
- (i) The Act is confined to shares in BVI companies, but shares in non-BVI companies (and other assets) will invariably be held by a BVI company to which VISTA applies and those assets will then (effectively) be held subject to a VISTA trust.
- (j) It was originally a requirement of the legislation that the sole trustee of a VISTA trust had to have a trust licence under the BVI's Banks and Trust Companies Act, 1990 and co-trusteeship was not permitted. However, as a result of reforms which

came into effect on 15 May 2013, it is merely a requirement of the legislation that one of the trustees (or the sole trustee) of a VISTA trust which is set up on or after that date must either have a trust licence under the 1990 Act or be a BVI private trust company which is exempt from the need to obtain a trust licence as a consequence of the Financial Services (Exemptions) Regulations, 2007 (as amended: see the summary of the BVI's private trust company regulations below). Accordingly co-trusteeship of new VISTA trusts is permitted and the 2013 amendments enable family-controlled VISTA trusts to be established and give foreign service providers which do not have licensed BVI trust companies an incentive to encourage the creation of further VISTA trusts, i.e. since they are no longer disqualified from being co-trustees and/or can set up exempt BVI private trust companies to be sole trustees or co-trustees of new VISTA trusts.

- (k) There were restrictions in the original VISTA trust legislation which prevented assets from being transferred or appointed out of other trusts to existing or new VISTA trusts in the exercise of powers of appointment and other powers. However these restrictions have been substantially diluted so that (depending on the terms of the relevant trusts) assets can now be transferred or appointed from other trusts ('**transferor trusts**') to new VISTA trusts provided (a) the transferor trusts are governed by BVI law and (b) at least one trustee of the transferor trust has a BVI trust licence or is an exempt BVI private trust company. These recent amendments provide significant opportunities for the assets of existing trusts to be 'VISTAized' and for advantage thereby to be taken of the benefits of the VISTA legislation. Although the ambit of the relevant powers in an existing trust, and the manner of their exercise, (and where relevant the doctrine of fraud on a power) would need to be considered, it should in many cases be possible for the proper law of an existing trust to be changed to BVI law, for a designated trustee (a licensed BVI company or an exempt BVI private trust company) to be appointed as the trust's sole trustee (or a co-trustee) and then, say, for a power of appointment (or power transferring the assets to a new VISTA trust) to be exercised. It is however essential that advice from a specialist BVI lawyer be obtained whenever consideration is given to VISTAizing trust assets.

#### - **Typical uses of VISTA trusts**

VISTA trusts are typically set up in the following circumstances:

- (a) when the settlor wishes to retain control, since matters will, when appropriate, generally be structured so that settlor-control is retained at the director (company) level.
- (b) When the settlor intends the shares which he wishes to settle on trust and/or the underlying assets of the company to be retained.
- (c) When trustee involvement in an underlying company's affairs is undesirable or inappropriate.
- (d) Where charitable or non-charitable purpose trusts are needed for securitisations and off-balance sheet transactions or to hold shares in private trust companies.

- (e) Where the underlying assets of the trust are to comprise of speculative investments or investments which involve a degree of risk which would otherwise be regarded as inappropriate for the trustees of a non-VISTA trust.

## **Non-Charitable purpose trusts**

In common with the other leading offshore jurisdictions the BVI has legislation enabling the creation of non-charitable purpose trusts (**'purpose trusts'**) and a great deal of use is made of this legislation, particularly in the commercial context (in order to take advantage of one of the features of such a trust which is that there is no beneficial owner of the trust's assets). Examples of the commercial use of purpose trusts include taking transactions off balance sheet, isolating assets in financial deals, separating voting from economic control and (especially) providing ownership structures for private trust companies.

### **- Conditions**

Section 84A of the Trustee Act permits purpose trusts to be created if the following conditions are satisfied:

- (a) the trust's purpose must be specific, reasonable and possible;
- (b) the purposes must not be immoral, contrary to public policy or unlawful;
- (c) at least one trustee of the trust must fall within the statutory definition of a 'designated person' (and this would normally involve the appointment of a British Virgin Islands licensed trust company or a BVI private trust company which is exempt from the need to obtain a trust licence as the sole trustee or one of the trustees of the trust);
- (d) the trust instrument must appoint a person as enforcer of the trust and must provide for the appointment of another enforcer on any occasion on which there is no enforcer (or no enforcer able and willing to act); and
- (e) the enforcer appointed by the trust instrument must either be a party to the trust instrument or give his, her or its consent in writing (addressed to the trustee who is a designated person) to act as enforcer of the trust.

### **- Purpose can be for the benefit of particular persons**

The requirement which appeared in the BVI's earlier purpose trust legislation to the effect that a purpose trust must not be for the benefit of 'particular persons' or of 'some aggregate of persons' was repealed in relation to trusts set up after February 2004, with the result that (as with Cayman Islands STAR trusts) the purpose of a trust which is set up under section 84A of the Trustee Act can be of benefit to one or more individuals or companies.

### **- Perpetual purpose trusts permitted**

BVI purpose trusts are exempt from the rule against perpetual trusts, with the result that perpetual purpose trusts are capable of being set up. However trust instruments have been given the *option* of specifying a terminating date or event, of providing for the disposition

of trust assets on the trust's termination and of providing that (before the trust's termination as a purpose trust) the trustees will owe no duty to any persons entitled on such termination.

## **Trustees who deal with lenders and other third parties**

### **- Background: difficulties which arise under English law**

As a consequence of one of the basic features of English trust law (i.e. that a trust is not a separate legal entity), a trust cannot as such enter into liabilities, with the result that the primary remedy of anyone dealing with a trustee is against such trustee. This traditionally made the trust an unattractive vehicle for commercial transactions, which seriously inhibited legitimate commercial dealings by trustees.

Because the primary remedy of the party to whom a liability is owed is against the trustee personally, the courts have only allowed that party recourse to the trust fund by way of subrogation to the trustee's right of reimbursement (so that the third party stands in the shoes of the trustee). However such a right of subrogation may be of no value in a variety of possible circumstances. It will be of no value, for example, if the trust is declared invalid. Nor will it be of any value if the trustees do not have the power to incur such liability (or if they do have the power but have not complied with their fiduciary duties or the internal procedures laid down by the trust). Similarly it may be of no value if the trustees have committed a previous breach of trust or if any of the trustees purporting to create the liability has not been validly appointed (or if the retirement of a previous trustee was ineffective). Additional difficulties of enforcement may arise if the trustee who incurred the liability has died, has retired or has moved.

Banks and other third parties who deal with trustees have often relied on legal opinions on the trust's validity and the third parties' ability to enforce their rights against the trust fund, but such opinions have increasingly included so many assumptions that the comfort of banks and other third parties has been correspondingly diluted.

Moreover trustees, even if acting properly, have been at personal risk if the assets of the trust fund are insufficient to meet the liability. Whilst trustees have been able to limit their liability to the assets of the trust for the time being, they have only been able to do this if they have included an express provision in the contract to that effect: it has not been sufficient for them merely to state that they are acting 'as trustees'.

It will be apparent from the above that the existing position under English law has been most unsatisfactory. Not only has it placed serious difficulties in the way of trustees, but it has also, because of those difficulties, seriously inhibited legitimate commercial dealings by them.

### **- Special provisions relating to trustees which deal with lenders and third parties**

With a view to making BVI trusts significantly more attractive in the commercial context, a number of provisions which facilitate dealings between trustees and third parties were included in the 2003 amendments to the Trustee Act. The provisions in question were based on proposals which were made by the English Trust Law Committee, but with a number of modifications, and make BVI trusts highly desirable in the commercial context.

- **Sections 95 and 96 – recourse permitted where reasonable enquiry made**

As a result of sections 95 and 96 of the Trustee Act, banks and other third parties dealing with trustees will be able to have recourse to the trust fund (and other protection) where, when entering into transactions, they have made reasonable enquiry that the trustee has the express power to enter into such transactions and has complied with any express requirements (such as requirements for consent) contained in the trust instrument.

- **Section 97 – exoneration where disclosure of fiduciary capacity**

If (and only if) there is a provision in the trust instrument to the effect that section 97 of the Trustee Act applies, the trustee of a trust will not be personally liable under any contract which it enters into with another if it has disclosed (or the other party was aware) that it was contracting as trustee (unless the contract provides otherwise); furthermore a claim based (*inter alia*) on such a contract may be satisfied out of the trust fund.

- **Section 98 – limitation of liability**

On the other hand, if the trust has not opted into the provisions of section 97 of the Trustee Act (and if the trust instrument does not provide otherwise), the new section 98 of the Trustee Act specifies that where a trustee enters into a contract, having disclosed his fiduciary capacity, it will be personally liable under the contract to the third party only to the extent of the value of the trust fund when the payment falls due (including the amount of any distributions made after the contract was entered into).

- **Section 101 – restricting future exercise of powers of investment and distribution**

Section 101 of the Act (as amended in 2013), which only applies where the trust ‘opts in’ to this provision, specifies that, where a person who lends money (or other assets) to a trustee requests the trustee to do so, the trustee may restrict its future powers of investment and distribution (and the powers of appointment and removal of trustees) in order to protect that person. The purpose of this new provision is to address the legitimate concerns of those who make loans to trustees to the effect that their rights might be diluted as a result of the manner in which the trust is administered after the liability has been incurred.

## **BVI conflict of laws provisions relating to trusts**

Since trusts governed by the laws of the BVI usually have significant legal links with the laws of one or more other jurisdictions, it is essential for the BVI to have adequate rules of resolving ‘choice of law’ questions relating to trusts. Although the majority of the provisions of the English Recognition of Trusts Act 1987 (incorporating as it does most of the provisions of the Hague Trusts Convention) have been extended to the Territory, so ensuring a certain amount of certainty in relation to many of the relevant conflict of law rules relating to trusts, specified matters are expressly excluded from that Act, meaning that it is vital for these rules to be reinforced by additional statutory provisions.

Following the 2003 amendments to the statute, the BVI’s Trustee Act now contains detailed and well-thought conflict of laws rules relating to trusts which were drafted with the assistance of Professor Jonathan Harris of Birmingham University in the UK with the intention of setting



up a regime which is likely to command a substantial degree of international recognition. These include comprehensive rules dealing with matters which are excluded from The Hague Trusts Convention which have therefore been drawn up with the objective of reflecting current common law trends. Whilst it cannot be guaranteed that these rules will necessarily correspond exactly with case law as it eventually develops in other common law jurisdictions, they are rules which are likely to command a certain degree of academic support. For that reason these rules should be seen by the courts of other jurisdictions as a legitimate and rational approach.

These conflict of laws rules apply to trusts generally, rather than merely to those which are governed by BVI law.

#### - **Forced heirship claims**

The Trustee Act also contains robust, comprehensive and carefully crafted provisions protecting BVI trusts (and dispositions to their trustee) against ‘forced heirship’ claims. These provisions, which have been modelled largely on the equivalent laws of the Cayman Islands (but subject to a number of refinements and modifications to reflect the Territory’s other laws), also prevent foreign judgments based on such forced heirship claims from being recognised or enforced in the Territory. In relation to trusts, it is now believed that the BVI not only has in force an anti-forced heirship regime which is as robust as that of any other offshore trust jurisdiction, but probably also has some of the most refined and comprehensive conflict of laws rules in the world.

### **Trustee and related services**

#### - **Licensed trustees**

According to statistics produced by the Financial Services Commission there are currently over 300 trust companies in the BVI, nearly 100 of which currently hold unrestricted trust licences allowing them to provide complete trustee services from within the BVI. Trust companies operating from within the Islands must conform to strict government regulations and maintain a minimum required capital and are supervised by the Financial Services Commission in accordance with internationally accepted supervision standards. Most BVI trust companies which have class 1 trust licences have also, since 15 May 2013, been able to act as executors of wills provided they have places of business (as defined by BVI statute) in the jurisdiction. There is also a substantial number of other well established and qualified service providers such as lawyers, accountants and investment advisors operating in the BVI which cater to the trust industry.

#### - **Private trust companies**

The Financial Services (Exemptions) Regulations, 2007 (the ‘**PTC Regulations**’) enable unlicensed private trust companies (“**PTCs**”) to be established in the BVI if the company satisfies a number of conditions which are not, in our experience, too onerous to comply with.

PTCs enjoy the benefit of limited liability and perpetual existence which are usually the features of corporate vehicles and have the following further advantages:

- (i) The principal advantage of a PTC is that, like the BVI's VISTA legislation, the establishment of a PTC generally enables settlors or settlors' family members or their appointees to exercise a significant degree of control over trustees' decisions by being directors of PTCs; this enables them to respond quickly to issues which arise and to make decisions on the basis of their own personal knowledge and changing circumstances.
- (ii) The corporate structure is readily understood by non-professionals, especially those from non-trust jurisdictions and can be easily integrated into a family office or commercial structure.
- (iii) Confidentiality is preserved and this is an issue which is of increasing importance to those from jurisdictions where concerns over financial privacy are driven by issues of personal safety.
- (iv) A PTC enables the trustee's charges to be kept in check.
- (v) PTCs are often set up in circumstances in which the underlying assets of a trust are to comprise of speculative investments or investments which involve a degree of risk which might be regarded as unacceptable to a risk-averse professional trustee.

- **Conditions with which a BVI private trust company must comply**

The conditions with which a BVI private trust company must comply are, essentially, as follows:

- (a) The company must be a BVI company (whether or not it was first incorporated in the BVI, so that companies which have been 'continued' in the BVI now also qualify); this would naturally mean, amongst other things, that the general requirements of the corporate and regulatory laws of the BVI must be satisfied.
- (b) The company's memorandum must state that it is a private trust company.
- (c) The company must be a limited company and its name must include the designation '(PTC)' before its permitted ending.
- (d) The company's registered agent must hold a Class 1 trust licence under the BVI's Banks and Trust Companies Act, 1990.
- (e) The company must not solicit trust business from members of the public.
- (f) The company must carry on no business other than that of being the trustee, protector or administrator of trusts (or managing or administering trusts).
- (g) All the company's trust business must be 'unremunerated trust business' and/or 'related trust business'. These terms are explained immediately below.

**Unremunerated trust business**

Although the term is defined widely to prevent potential abuse, in most cases a company will be carrying on ‘unremunerated trust business’ where no remuneration is paid to the company or anyone associated with it in respect of the provision by the company of its trustee services. However it is permissible for professional directors who are not otherwise associated with the company to be remunerated and payments to the company to cover its legitimate expenses (such as the government’s incorporation and renewal fees, the fees of otherwise unconnected professional advisors, and the fees of the registered agent) will not in general be regarded as remuneration for these purposes.

### **Related trust business**

A company will, on the other hand, be regarded as carrying on ‘related trust business’ where all the beneficiaries of the trust (or trusts) of which it is trustee are related (in the manner specified in paragraph 3 of the PTC Regulations) to its settlor (and in the case of multiple trusts, the trusts either have the same settlor or else the settlors of all trusts of which the company is trustee are related in the prescribed manner to each other); however, the trust’s beneficiaries may also include the settlor (or settlors) or the trust (or trusts) and/or charities.

### **- Why the BVI is increasingly selected as a jurisdiction to use to incorporate private trust companies**

The BVI is increasingly selected as one of the leading jurisdictions to use to incorporate PTCs for the following reasons:

- (i) Provided all the conditions specified in paragraphs (a) to (g) immediately above have been satisfied, no licence is needed and a BVI company can be incorporated very quickly.
- (ii) It is not necessary to have a local director or authorised representative (or indeed a director with relevant qualifications or experience).
- (iii) There are no capitalisation requirements for exempt PTCs.
- (iv) The company need not establish a physical presence in the BVI.
- (v) The costs of setting up and running the company are extremely competitive: the Government’s fee will in most cases only be an additional US\$900 (i.e. a total of \$1,250 *including* the Government’s incorporation/renewal fee) on incorporation and annually thereafter.
- (vi) There is no need to list particular trusts in the company’s memorandum.
- (vii) Only the PTC’s memorandum and articles of association, which are likely in most cases to be fairly standard documents revealing little more than the name of the company and the identity of its registered agent, will be filed publicly and (except in cases of abuse) there is no need to supply the regulatory authorities with copies of the trust documentation or to disclose the identity of the settlor or beneficiaries

of the trust; the company's registered agent must instead be provided with copies of the relevant documents.

- (viii) With over 1,000,000 companies on its register (of which approximately 500,000 are still active), the BVI is regarded as the world's leading international financial centre for international business companies.

- **Individuals and non-BVI companies as trustees**

Other than those of the requirements of VISTA and the BVI's VISTA trust legislation which are summarised above which require at least one trustee of a VISTA or a BVI purpose trust to be a licensed trustee or a BVI private trust company, there are no BVI restrictions on the ability of individuals (whether or not resident in the BVI) or non-BVI companies to act as trustees of BVI trusts.

## **Conclusion**

The BVI is renowned for its state of the art legislation relating to trusts and trustee services which has been developed in close partnership with the private sector to ensure that it keeps pace with the modern demands on trusts. It is perceived as innovative and flexible and continues to attract positive attention from the international financial community.

*The information contained in this memorandum is general in nature and does not constitute legal advice. Appropriate legal and other professional advice should be sought for any specific matter.*

**Christopher McKenzie**  
**Partner – BVI Trusts & Estates/Private Client**  
**O'NEAL WEBSTER (UK) LLP**  
2 John Street  
London WC1N 2ES  
Tel: +44 (0)203 405 4278 (office)  
+44 (0)203 405 4279 (direct)  
+44 (0)783 702 5118 (cell)  
[cmckenzie@onealwebster.com](mailto:cmckenzie@onealwebster.com)